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No. 85-501 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

GRETCHEN C. GREENSPUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner knowingly and voluntarily chose to proceed without the assistance of counsel when she repeatedly refused to submit information to justify the appointment of counsel under the Criminal Justice Act.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 8a-9a) affirming petitioner's conviction is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1985, and a petition for rehearing was denied on July 22, 1985 (Pet. App. 10a). The petition for a writ of certiorari was filed on September 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner filed income tax "returns" for 1980 and 1981 that contained no information from which her tax liability could be computed. Instead, petitioner asserted the Fifth Amendment privilege against compelled self-incrimination in response to every question concerning her income (C.A. App. 191a).[1] Although petitioner received $30,424 in commissions during 1980 and $28,539 in commissions during 1981, she paid no tax thereon (C.A. App. 210a, 218a, 309a).[2]

In a two-count information filed on December 12, 1983, petitioner was charged under 26 U.S.C. 7203 with willfully failing to file income tax returns for 1980 and 1981. On December 19, 1983, petitioner filed a "Notice and Demand to Proceed in Forma Pauperis" and an "Affidavit of Impecuniosity" notarized by her husband (C.A. App. 5a, 44a). The affidavit stated that she was unemployed, had expenses exceeding her income, owned no unencumbered realty, had no insurance policies with any cash value, and

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[1] Clearly such filings were not valid income tax returns and supported a conviction under 26 U.S.C. 7203 for failure to file income tax returns. *United States* v. *Vance*, 730 F.2d 736, 738 (11th Cir. 1984); *United States* v. *Stillhammer*, 706 F.2d 1072 (10th Cir. 1983); *United States* v. *Heise*, 709 F.2d 449, 451 (6th Cir.), cert. denied, 464 U.S. 918 (1983); *United States* v. *Moore*, 627 F.2d 830 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981).

[2] Although petitioner filed proper returns for 1978 and 1979 (C.A. App. 199a), she now claims that only corporations, "franchised" or "juristic" persons, partnerships and government employees must file returns and pay income taxes (C.A. App. 214a). In her view, wages are not income (C.A. App. 189a, 194a) but an equal exchange for labor (C.A. App. 357a) from which no taxable gain is derived (C.A. App. 403a).

had liabilities exceeding her assets (C.A. App. 9a-10a).

On December 22, 1983, petitioner sought a writ of prohibition to stay the criminal proceedings. The court of appeals permitted her to proceed in forma pauperis but denied the petition on the same day (C.A. App. 36a). Petitioner was then arraigned on December 29, 1983. The magistrate advised her that if she could not afford counsel, the court, after appropriate inquiry, would appoint counsel. Petitioner said she was attempting to employ counsel. Over her objection, pleas of not guilty were entered (C.A. App. 32a, 43a). Petitioner thereafter filed three petitions for writs of mandamus and sought to proceed in forma pauperis in connection with them.[3] The court of appeals denied each request because petitioner's affidavit failed to show that she could not afford counsel (C.A. App. 36a-37a).

On February 9, 1984, at a hearing to determine if she had obtained counsel, petitioner stated that she was unable to "obtain or afford" counsel. The district court then requested that petitioner be placed under oath so that it could inquire about her finances, but petitioner refused to be sworn and questioned. The court explained that in order to obtain court-appointed counsel, petitioner would be required to testify under oath concerning her finances or submit an appropriate affidavit setting forth the basis for her claim that she was unable to afford counsel. Petitioner refused to make "admissions or confessions," claiming that her affidavit established that she could not afford counsel. The court advised her

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[3] In those filings, petitioner sought to disqualify the trial judge, demanded in forma pauperis status, and again attempted to stay the criminal proceedings (C.A. App. 37a).

that the conclusory statements in the affidavit—such as "I own no unencumbered real estate" and "my liabilities equal or exceed my assets"—were insufficient (C.A. App. 43a-44a).

On February 14, 1984, the district court again informed petitioner that it would appoint counsel at any stage of the proceedings if she either submitted a sufficient affidavit or responded under oath or affirmation to the court's inquiries about her inability to afford counsel. Petitioner refused, again claiming the affidavit was sufficient (C.A. App. 44a-45a).

On February 29, 1984, the district court issued a memorandum opinion "to ensure that [petitioner] is well aware of her current status" (C.A. App. 33a). In that memorandum, the court reiterated that it would appoint counsel when petitioner filed a sufficient affidavit or testified under oath concerning her ability to obtain counsel. Noting that petitioner referred at the February 9th hearing to making "admissions or confessions," the court assured her that it would not permit the government to use against her at trial the information the court required in connection with the possible appointment of counsel. The court also told petitioner that if she did not provide the necessary information, she would have to proceed to trial pro se (C.A. App. 45a-46a). The court then set a hearing in order to reiterate to petitioner the dangers of proceeding pro se and to afford petitioner the opportunity once again to establish that she could not afford counsel (C.A. App. 47a, 49a). At the hearing, petitioner again was informed that the information given in connection with her request for counsel could not be used against her, but she still refused to testify. The court found that her conduct was a "manipulative dilatory tactic designed

to delay the trial" and that her decision not to furnish the required information to support the appointment of counsel constituted a knowing and voluntary waiver of her right to the assistance of counsel (C.A. App. 149a, 152a-153a).

On May 3, 1984, a jury found petitioner guilty as charged (C.A. App. 57a). Petitioner's motion for acquittal or a new trial was denied (C.A. App. 65a), and she was sentenced to a term of six months' imprisonment and five years' probation (C.A. App. 547a).

Petitioner appealed and requested that counsel be appointed for the appeal. The district court did not certify that petitioner was entitled to proceed in forma pauperis, because she again failed to provide sufficient financial information (C.A. App. 550a-554a). The court of appeals affirmed (Pet. App. 8a-9a).

ARGUMENT

Petitioner contends (Pet. 14-16) that she was unconstitutionally denied the assistance of counsel during her arraignment, trial, sentencing, and appeal. The record establishes that petitioner's contention is without merit. Petitioner was repeatedly afforded the opportunity to show her entitlement to court-appointed counsel but consistently refused to submit the necessary information. The unpublished order of the court of appeals affirming petitioner's conviction in these circumstances does not conflict with any decision of this Court or of any other court of appeals. Further review of this factbound question is not warranted.

1. Petitioner was not denied the right to counsel at arraignment. The magistrate informed petitioner that if she could not afford counsel, the court would appoint counsel. After petitioner indicated that she

was attemping to employ counsel, the magistrate entered pleas of not guilty for her (C.A. App. 42a). Because it was not clear that petitioner was unable to employ counsel, the magistrate's actions were proper. See *Government of Canal Zone* v. *Peach*, 602 F.2d 101, 104 (5th Cir.), cert. denied, 444 U.S. 952 (1979).

Moreover, the purpose of the application of the Sixth Amendment guarantee to a pretrial stage of the proceedings is to prevent the occurrence of events that "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224 (1967). See also *United States* v. *Ash*, 413 U.S. 300, 315-316 (1973). There were no such consequences here. The notes of the arraignment hearing showed that the magistrate made sure that petitioner had received a copy of the information; proceeded with the arraignment (presumably including a statement of the substance of the charges, see Fed. R. Crim. P. 10); and informed petitioner that he would not ask her to enter an "uncounseled plea," but would enter a plea of not guilty for her in accordance with the arraignment procedure followed for unrepresented defendants (C.A. App. 41a-42a). At a subsequent hearing, the district court fully explained to petitioner the nature of the charges against her (C.A. App. 142a-148a). Petitioner has not made any showing to the contrary. Cf. *Garland* v. *Washington*, 232 U.S. 642 (1914). Petitioner also has not contended that the pleas of not guilty that the magistrate directed to be entered prejudicially affected the subsequent proceedings, and we cannot conceive how they could have done so. Compare *White* v. *Maryland*, 373 U.S. 59 (1963); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961). Indeed, it is standard procedure for a trial court to enter

such a plea where the defendant refuses to plead. Fed. R. Crim. P. 11(a)(1). Thus, petitioner was not prejudiced by any events at arraignment, and reversal would not be warranted even if counsel had been improperly denied at that stage. *Siverson* v. *O'Leary*, 764 F.2d 1208, 1220-1221 (7th Cir. 1985); *Fleming* v. *Kemp*, 748 F.2d 1435, 1442-1443 n.26 (11th Cir. 1984); *United States* v. *Byers*, 740 F.2d 1104, 1118 n.14, 1165 (D.C. Cir. 1984); *Moses* v. *Helgemoe*, 562 F.2d 62, 64-65 (1st Cir. 1976); *United States* v. *Calabro*, 467 F.2d 973, 989 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Chin Kee* v. *Massachusetts*, 407 F.2d 10 (1st Cir.), cert. denied, 395 U.S. 982 (1969); *McConnell* v. *United States*, 375 F.2d 905, 909 (5th Cir. 1967); *Anderson* v. *United States*, 352 F.2d 945, 947 (D.C. Cir. 1965).

2. Nor was petitioner unconstitutionally denied the assistance of counsel at trial. The conclusory affidavit did not satisfy her burden of establishing that she could not afford counsel.[4] *United States* v. *Harris*, 707 F.2d 653, 660 (2d Cir.), cert. denied, 464 U.S. 997 (1983); *United States* v. *McQuade*, 647 F.2d 938 (9th Cir. 1981), cert. denied, 455 U.S. 958 (1982); *United States* v. *Anderson*, 567 F.2d 839, 840 (8th Cir. 1977); *United States* v. *Ellsworth*, 547 F.2d 1096, 1098 (9th Cir. 1976), cert. denied, 431 U.S. 931 (1977).[5] Petitioner refused to provide ad-

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[4] The district court noted that many people who are not indigent do not own unencumbered realty or always have income that exceeds their expenses (C.A. App. 86a, 95a). A conclusory assertion of lack of income is especially worthy of scrutiny when made by someone who professes to believe that remuneration for work is not income. See note 2, *supra*.

[5] The court of appeals' initial grant of petitioner's request to file a writ of prohibition in forma pauperis is of no

ditional information, even though the district court assured her that any such information could not be used by the government at trial. The district court held three hearings, continued the trial twice, and did not start the trial until 13 days after informing petitioner that: (1) any information she provided could not be used against her, and (2) if she did not provide additional information, she would have to proceed to trial pro se (C.A. App. 55a, 148a-149a). She also was twice informed that counsel could be appointed at any stage of the proceedings (C.A. App. 45a, 121a). Petitioner nevertheless made no further attempt to qualify for appointment of counsel until after she had been convicted.

In these circumstances, it is clear that petitioner voluntarily proceeded to trial pro se. *United States* v. *Harris*, 707 F.2d at 662; *Schlang* v. *Heard*, 691 F.2d 796, 798-799 (5th Cir. 1982); *United States* v. *Titus*, 576 F.2d 210, 211 (9th Cir.), cert. denied, 439 U.S. 860 (1978); *United States* v. *McQuade*, *supra*; *United States* v. *Ellsworth*, *supra*; *United States* v. *Kaufman*, 452 F.2d 1202 (4th Cir. 1971), cert. denied, 405 U.S. 989 (1972); cf. *United States* v. *Peister*, 631 F.2d 658, 661-662 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981). Compare *United States* v. *Moore*, 671 F.2d 139 (5th Cir. 1982), cert. denied, 464 U.S. 859 (1983).[6]

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consequence here. The district court had not yet acted on petitioner's initial motion when the court of appeals permitted petitioner to proceed in forma pauperis on that occasion, and the court of appeals simultaneously denied the writ of prohibition.

[6] Nor is reversal required because the court did not conduct an in camera hearing. See *United States* v. *Harris*, 707 F.2d

3. Finally, petitioner was not unconstitutionally denied the assistance of counsel at sentencing or on appeal. After trial, the district court afforded petitioner another opportunity to qualify for appointed counsel (C.A. App. 550a-554a). Although petitioner provided some additional information, she did not disclose the nature or value of her personal property.[7] Hence, petitioner once again did not meet her

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at 662. In *United States* v. *Anderson*, 567 F.2d 839 (8th Cir. 1977), the court held that under the circumstances presented there financial data could be submitted in camera in order that the defendant not be forced to choose between his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. In support of this conclusion, however, the court cited *Simmons* v. *United States*, 390 U.S. 377 (1968), and *United States* v. *Branker*, 418 F.2d 378, 380 (2d Cir. 1969), noting that the Second Circuit in *Branker* had extended the rationale of *Simmons* to testimony given by the defendant at a hearing on his application to proceed in forma pauperis, but that this Court had not resolved that question in *United States* v. *Kahan*, 415 U.S. 239, 243 (1974). See 567 F.2d at 840-841 & n.4. The Eighth Circuit did not suggest in *Anderson* that an in camera submission would be required even where an immunity rule, such as that in *Branker*, does apply. In this case, the district court, citing *Branker*, made clear that it would not permit petitioner's statements to be used against her at trial.

In addition, although the prosecutor offered no objection to the court's receiving an in camera submission (Pet. App. 5a-6a; C.A. App. 154a), petitioner gave no indication in the numerous hearings in district court that such an arrangement was acceptable to her.

[7] Contrary to petitioner's contention (Pet. 12), the district court never indicated that petitioner could not afford counsel. At sentencing, the court stated: "[T]he things you have said in your [new] affidavit are all indicative of the fact that you are financially unable to obtain counsel, except, and I am making this clear, you have not mentioned * * * whether you

burden of establishing that she was unable to employ counsel. Accordingly, she waived the assistance of counsel at sentencing and on appeal as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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own personal property" (C.A. App. 550a). The court listed automobiles, stocks, bonds, cash and certificates of deposit as the types of property with which it was concerned. Petitioner never responded to those concerns.

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